case, as the bar has been told many times." *United States* v. *Carver*, 260 U. S. 482, 490.

Judgment reversed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* LOGAN.

SAME *v.* BRUCE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 521 and 522. Argued April 29, 1931.—Decided May 18, 1931.

1. Prior to March, 1913, the taxpayer held shares in one of several steel companies, owners of the stock of a company engaged in mining ore under a long term lease. The lease did not require production of maximum or minimum tonnage or any definite payments. By agreement among themselves, the steel companies were entitled to share the ore extracted according to their stock holdings in the mining company. In 1916, the taxpayer and her co-shareholders sold their shares to another steel company, which thus became entitled to participate in the ores thereafter taken from the leased mine. The consideration for the sale was part cash and in part the purchaser's agreement to pay annually thereafter for distribution among the selling stockholders 60 cents for each ton of ore apportioned to it. *Held*, that until the receipts by the taxpayer under this contract shall have equalled the value of her shares in March, 1913, they are return of capital and are not taxable in part as income. P. 412.
2. Another of the vendor stockholders died in 1917, bequeathing her interest in the payments to be made by the purchaser. *Held* that, prior to return of the amount at which the bequest was valued for federal estate tax purposes, the payments received by the legatee are not income. P. 413.

42 F. (2d) 193; *id.* 197, affirmed.

CERTIORARI, 282 U. S. 833, to review judgments reversing orders of the Board of Tax Appeals determining income tax deficiencies. 12 B. T. A. 586.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. Sewall Key* and *J. Louis Monarch,* Special Assistants to the Attorney General, and *Whitney North Seymour* were on the brief, for petitioner.

Respondents sold corporate stock, receiving therefor part cash and an interest in a contract providing for a payment of 60 cents on each ton of ore which the purchaser became entitled to take from the Mahoning mine. Respondents later acquired additional interests in the same contract by bequest from their mother.

The Commissioner determined that the contract had a fair market value and accordingly treated the sale of the stock as a closed transaction and valued the contract rights as of the time of their receipt, which he used as the basis for apportioning the annual receipts from the contract between income and capital.

The court below held that the fair market value of the contract had not been established, that the sale of respondents' stock was not a closed transaction, and that no part of the annual receipts from the contract was income, because respondents had not yet received the March 1, 1913, value of their stock or the value of the inherited interests in the contract at the time of their mother's death.

Whether property has a fair market value is a question of fact. The finding of the Board that the contract had fair market value was supported by substantial evidence and should have been accepted by the court below, as it was by the Circuit Court of Appeals for the Sixth Circuit in a group of cases presenting the same question with respect to the same transaction. *Irwin* v. *Gavit,* 268 U. S. 161; *Hitchcock* v. *Commissioner,* 44 F. (2d) 756, 758; *Newman* v. *Commissioner,* 41 F. (2d) 743, certiorari denied, 282 U. S. 858; *Chicago Ry. Equip. Co.*

v. *Blair*, 20 F. (2d) 10, 13; *Reinecke* v. *Spalding*, 280 U. S. 227; *Bishoff* v. *Commissioner*, 27 F. (2d) 91, 92; *Bedell* v. *Commissioner*, 30 F. (2d) 622, 625; *Stone* v. *United States*, 164 U. S. 380, 382; *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189, 196.

The annual receipts from the contract were inherently income; and it is not entirely clear that respondents were entitled to any of the statutory allowances for depletion or exhaustion. However, an allowance was made by the Board for the exhaustion of the contract, and for present purposes we merely contend that it is sufficient. The Circuit Court of Appeals for the Sixth Circuit approved the apportionment between income and capital, and its decision is in direct conflict with the decision of the court below. The requirement that capital must all be returned tax free before there is any income is limited to cases of sales, and in several decisions the courts have held that, where the period of payment is extended over several years, it is more logical to say there is some income involved in each payment. *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364; *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503; *Goldfield Cons. Mines Co.* v. *Scott*, 247 U. S. 126; *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103; *New Creek Co.* v. *Lederer*, 295 Fed. 433, certiorari denied, 265 U. S. 581; *Kentucky Tobacco Co.* v. *Lucas*, 5 F. (2d) 723; *Roxburghe* v. *United States*, 64 Ct. Cls. 223, certiorari denied, 278 U. S. 598; *Peck* v. *Kinney*, 143 Fed. 76, 80; *Hitchcock* v. *Commissioner*, 44 F. (2d) 756; *Eldredge* v. *United States*, 31 F. (2d) 924; *Warner* v. *Walsh*, 15 F. (2d) 367; *United States* v. *Bolster*, 26 F. (2d) 760; *Allen* v. *Brandeis*, 29 F. (2d) 363; Klein *v.* Commissioner, 6 B. T. A. 617; *Ruth Iron Co.* v. *Commissioner*, 26 F. (2d) 30; *Kosmerl* v. *Commissioner*, 25 F. (2d) 87; *Platt* v. *Bowers*, 13 F. (2d) 951; *Rosenberger* v. *McCaughn*, 25 F. (2d) 669, certiorari denied, 278 U. S. 604; *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179; *Nichols*

v. *United States*, 64 Ct. Cls. 241, certiorari denied, 277 U. S. 584.

Messrs. Herbert C. Smyth and *John Enrietto*, with whom *Messrs. Millard F. Tompkins* and *John W. Ford* were on the brief, for Mrs. Logan.

The transaction of March 11, 1916, was a sale of stock and not an exchange of property for property; so that there is no taxable gain until the aggregate payments exceed the March 1, 1913, value of the stock. Johnson *v.* Commissioner, 19 B. T. A. 840; Pinellas Ice Co. *v.* Commissioner, 21 B. T. A. 425; Geary *v.* Commissioner, 6 B. T. A. 1109.

In determining the gain, if any, on the sale of property, the March 1, 1913, value must be deducted before there is any taxable gain. *Goodrich* v. *Edwards*, 255 U. S. 527; *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179; *Burnet* v. *Thompson Oil & Gas Co., ante*, p. 301; *Lucas* v. *Alexander*, 279 U. S. 573, 580. Distinguishing: *Ruth Iron Co.* v. *Commissioner*, 26 F. (2d) 30; *Kosmerl* v. *Commissioner*, 25 F. (2d) 87; *Platt* v. *Bowers*, 13 F. (2d) 951; *Eldredge* v. *United States*, 31 F. (2d) 924.

It is stipulated that the total payment received by the respondent from the sale of her 250 shares of stock, down to and including the year 1920, was less than the March 1, 1913, value of the shares sold. The fact that some of the payments are spread over a series of years does not render the statute inoperative and cause something less to be restored, to wit, the supposed present value determined by mathematical formula of these future contingent payments. *Hitchcock* v. *Commissioner*, 44 F. (2d) 756, 757.

Before there is any taxable gain, the consideration must be received and must be cash, or readily reducible to cash. *Bedell* v. *Commissioner*, 30 F. (2d) 622, 624. The transaction here involved cannot be treated as a

closed and completed transaction until the promise to make the future payments is performed.

The expectation or prospect of profit does not give rise to a taxable transaction. The gain must be realized. *Lynch* v. *Turrish,* 247 U. S. 221, 230; *Safe Deposit & Tr. Co.* v. *Miles,* 273 Fed. 822, 825; *Weiss* v. *Stearn,* 265 U. S. 242, 252; *Lucas* v. *American Code Co.,* 280 U. S. 445, 449.

In the following cases on sales of property, the court found that the gain, if any, is postponed to the date of realization. *United States* v. *Schillinger,* 14 Blatch. 71; *United States* v. *Christine Oil Co.,* 269 Fed. 458; *Bourn* v. *McLaughlin,* 19 F. (2d) 148; *Tsivoglou* v. *United States,* 27 F. (2d) 564, affirmed, 31 F. (2d) 706.

The taxing statutes and regulations are simply aids in arriving at income and cannot be used to create income. *Taplin* v. *Commissioner,* 41 F. (2d) 454, 456.

The consideration consisting of a promise to make payments in the future, uncertain in amount, for a present transfer of stock on March 11, 1916, was not the equivalent of cash, and hence, the transaction was not a closed and completed one in 1916.

The question is whether any fair market value can be definitely ascertained to the extent that a taxpayer can be taxed for a profit merely because he is the promisee and taxed on that profit before performance. A value presupposes that it can be determined with substantial certainty and without undue complexity. Algebraic formulae for determining values are not lightly to be imputed to legislators. *Edwards* v. *Slocum,* 287 Fed. 651.

The existence of a so-called intrinsic value is not sufficient to support a fair market value for purposes of computing gain or loss. *Bourn* v. *McLaughlin,* 19 F. (2d) 148; *Tsivoglou* v. *United States,* 27 F. (2d) 564, affirmed, 31 F. (2d) 706.

The promise to pay in this case is so contingent, uncertain and indefinite that it cannot be considered the equivalent of cash or to have a "fair market value."

As to the interest in the payments bequeathed to Mrs. Logan, she received no taxable income until the amounts received by her exceeded the value at which they were included in the gross estate for federal estate taxation.

Even if the sale was a closed and completed transaction in 1916, the apportionment of each payment thereafter into capital and income, as made by the Board of Tax Appeals and the Commissioner in each year, is wrong.

Mr. Raymond B. Goodell, with whom *Mr. Walter M. Anderson* was on the brief, for Mrs. Bruce.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

These causes present the same questions. One opinion, stating the essential circumstances disclosed in No. 521, will suffice for both.

Prior to March, 1913, and until March 11, 1916, respondent, Mrs. Logan, owned 250 of the 4,000 capital shares issued by the Andrews & Hitchcock Iron Company. It held 12% of the stock of the Mahoning Ore & Steel Company, an operating concern. In 1895 the latter corporation procured a lease for 97 years upon the "Mahoning" mine and since then has regularly taken therefrom large, but varying, quantities of iron ore—in 1913, 1,515,428 tons; in 1914, 1,212,287 tons; in 1915, 2,311,940 tons; in 1919, 1,217,167 tons; in 1921, 303,020 tons; in 1923, 3,029,865 tons. The lease contract did not require production of either maximum or minimum tonnage or any definite payments. Through an agreement of stockholders (steel manufacturers) the Mahoning Company is obligated to apportion extracted ore among them according to their holdings.

On March 11, 1916, the owners of all the shares in Andrews & Hitchcock Company sold them to Youngstown Sheet & Tube Company, which thus acquired, among other things, 12% of the Mahoning Company's stock and the right to receive the same percentage of ore thereafter taken from the leased mine.

For the shares so acquired the Youngstown Company paid the holders $2,200,000 in money and agreed to pay annually thereafter for distribution among them 60 cents for each ton of ore apportioned to it. Of this cash Mrs. Logan received 250/4000ths—$137,500; and she became entitled to the same fraction of any annual payment thereafter made by the purchaser under the terms of sale.

Mrs. Logan's mother had long owned 1100 shares of the Andrews & Hitchcock Company. She died in 1917, leaving to the daughter one-half of her interest in payments thereafter made by the Youngstown Company. This bequest was appraised for federal estate tax purposes at $277,164.50.

During 1917, 1918, 1919 and 1920 the Youngstown Company paid large sums under the agreement. Out of these respondent received on account of her 250 shares $9,900.00 in 1917, $11,250.00 in 1918, $8,995.50 in 1919, $5,444.30 in 1920—$35,589.80. By reason of the interest from her mother's estate she received $19,790.10 in 1919, and $11,977.49 in 1920.

Reports of income for 1918, 1919 and 1920 were made by Mrs. Logan upon the basis of cash receipts and disbursements. They included no part of what she had obtained from annual payments by the Youngstown Company. She maintains that until the total amount actually received by her from the sale of her shares equals their value on March 1, 1913, no taxable income will arise from the transaction. Also that until she actually receives by reason of the right bequeathed to her a sum equal to its

appraised value, there will be no taxable income therefrom.

On March 1, 1913, the value of the 250 shares then held by Mrs. Logan *exceeded* $173,089.80—the total of all sums actually received by her prior to 1921 from their sale ($137,500.00 cash in 1916 plus four annual payments amounting to $35,589.80). That value also exceeded original cost of the shares. The amount received on the interest devised by her mother was less than its valuation for estate taxation; also less than the value when acquired by Mrs. Logan.

The Commissioner ruled that the obligation of the Youngstown Company to pay 60 cents per ton had a fair market value of $1,942,111.46 on March 11, 1916; that this value should be treated as so much cash and the sale of the stock regarded as a closed transaction with no profit in 1916. He also used this valuation as the basis for apportioning subsequent annual receipts between income and return of capital. His calculations, based upon estimates and assumptions, are too intricate for brief statement.* He made deficiency assessments according to the view just stated and the Board of Tax Appeals approved the result.

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* In the brief for petitioner the following appears:

"The fair market value of the Youngstown contract on March 11, 1916, was found by the Commissioner to be $1,942,111.46. This was based upon an estimate that the ore reserves at the Mahoning mine amounted to 82,858,535 tons; that all such ore would be mined; that 12 per cent (or 9,942,564.2 tons) would be delivered to the Youngstown Company. The total amount to be received by all the vendors of stock would then be $5,965,814.52 at the rate of 60 cents per ton. The Commissioner's figure for the fair market value on March 11, 1916, was the then worth of $5,965,814.52, upon the assumption that the amount was to be received in equal annual installments during 45 years, discounted at 6 per cent, with a provision for a sinking fund at 4 per cent. For lack of evidence to the contrary this value was approved by the Board. The value of the 550/4000 interest

The Circuit Court of Appeals held that, in the circumstances, it was impossible to determine with fair certainty the market value of the agreement by the Youngstown Company to pay 60 cents per ton. Also, that respondent was entitled to the return of her capital—the value of 250 shares on March 1, 1913, and the assessed value of the interest derived from her mother—before she could be charged with any taxable income. As this had not in fact been returned, there was no taxable income.

We agree with the result reached by the Circuit Court of Appeals.

The 1916 transaction was a sale of stock—not an exchange of property. We are not dealing with royalties or deductions from gross income because of depletion of mining property. Nor does the situation demand that an effort be made to place according to the best available data some approximate value upon the contract for future payments. This probably was necessary in order to assess the mother's estate. As annual payments on account of extracted ore come in they can be readily apportioned first as return of capital and later as profit. The liability for income tax ultimately can be fairly determined without resort to mere estimates, assumptions and speculation.

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which each acquired by bequest was fixed at $277,164.50 for purposes of Federal estate tax at the time of the mother's death.

"During the years here involved the Youngstown Company made payments in accordance with the terms of the contract, and respondents respectively received sums proportionate to the interests in the contract which they acquired by exchange of property and by bequest.

"The Board held that respondents' receipts from the contract, during the years in question, represented 'gross income'; that respondents should be allowed to deduct from said gross income a reasonable allowance for exhaustion of their contract interests; and that the balance of the receipts should be regarded as taxable income."

When the profit, if any, is actually realized, the taxpayer will be required to respond. The consideration for the sale was $2,200,000.00 in cash and the promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty. The promise was in no proper sense equivalent to cash. It had no ascertainable fair market value. The transaction was not a closed one. Respondent might never recoup her capital investment from payments only conditionally promised. Prior to 1921 all receipts from the sale of her shares amounted to less than their value on March 1, 1913. She properly demanded the return of her capital investment before assessment of any taxable profit based on conjecture.

"In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration." *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 184, 185. Rev. Act 1916, § 2, 39 Stat. 757, 758; Rev. Act 1918, c. 18, 40 Stat. 1057. Ordinarily, at least, a taxpayer may not deduct from gross receipts a supposed loss which in fact is represented by his outstanding note. *Eckert* v. *Commisioner of Internal Revenue, ante,* p. 140. And, conversely, a promise to pay indeterminate sums of money is not necessarily taxable income. "Generally speaking, the income tax law is concerned only with realized losses, as with realized gains." *Lucas* v. *American Code Co.*, 280 U. S. 445, 449.

From her mother's estate Mrs. Logan obtained the right to share in possible proceeds of a contract thereafter to pay indefinite sums. The value of this was assumed to be $277,164.50 and its transfer was so taxed. Some valuation—speculative or otherwise—was necessary in order to close the estate. It may never yield as much, it may

yield more. If a sum equal to the value thus ascertained had been invested in an annuity contract, payments thereunder would have been free from income tax until the owner had recouped his capital investment. We think a like rule should be applied here. The statute definitely excepts bequests from receipts which go to make up taxable income. See *Burnet* v. *Whitehouse, ante,* p. 148.

The judgments below are

Affirmed.

UNITED STATES EX REL. McLENNAN *v.* WILBUR, SECRETARY OF THE INTERIOR.

UNITED STATES EX REL. SIMPSON *v.* WILBUR, SECRETARY OF THE INTERIOR, ET AL.

UNITED STATES EX REL. BARTON *v.* WILBUR, SECRETARY OF THE INTERIOR.

UNITED STATES EX REL. PYRON *v.* WILBUR, SECRETARY OF THE INTERIOR, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 618, 676, 704, 743. Argued April 15, 16, 1931.—Decided May 18, 1931.

1. The provisions of the Mineral Leasing Act of February 25, 1920, plainly indicate that Congress held in mind the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion; also, the difference between applicants for mere privileges and those persons who, because of expenditures, or otherwise, deserved special consideration. P. 418.
2. Section 13 of this Act, by which the Secretary is "authorized" to grant prospecting permits looking to the discovery and exploitation of oil deposits belonging to the United States, is susceptible of the construction that it leaves the Secretary a discretion to reject, or refuse to receive, all applications for such permits, by a general order made in pursuance of a policy of the President to conserve such deposits. P. 419.